86-265

NO. _____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

o

G & M RICHMOND

Appellants

vs.

CITY OF RICHMOND HEIGHTS

Appellees

o

APPEAL FROM THE
SUPREME COURT OF OHIO

o

JURISDICTIONAL STATEMENT

o

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DATE: August, 1986

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QUESTION PRESENTED

Does Chapter 1135 of the Ordinances of the City of Richmond Heights, Ohio, restricting the use of Appellant's land to R-1 Single Family Residential use, deprive Appellant of the lawful use of its property, without due process, and constitute an unconstitutional "taking" in violation of and contrary to the Fifth Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment, and contrary to §§ 1, 16, and 19 of Article II of the Constitution of the State of Ohio?

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There is a continuing conflict between landowners with various municipalities planning commissions and other Governmental Agencies as to the best and most economical use of development of land. Many of the restrictions preventing the most appropriate use, as in the instant case where the land was first zoned for Single-Family Residences in 1929, no longer reflect the reality of the development of adjacent land or the economic realities of building costs today. Many zoning and building restrictions constitute an actual taking of the land without actual legal condemnation procedures, where, as in the instant case, such zoning restrictions prevent even a "break-even" possibility of use or development of the land as presently zoned. New clear cut guidelines are needed.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

G & M RICHMOND
Appellant

vs.

CITY OF RICHMOND HEIGHTS
Appellee

ON APPEAL FROM THE
SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Entry of the Supreme Court of Ohio dismissing, sua sponte, the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record and the claimed appeal as of

right is set forth in Appendix A, at page 44, infra.

The decision of the Court of Appeals for Cuyahoga County is not officially reported. A copy of the Judgment, Opinion is set forth in Appendix B, infra, and the Dissenting Opinion is set forth at Page 45 of Appendix B. The Memorandum of Opinion and Judgment Entry of the Court of Common Pleas of Cuyahoga County are set forth in Appendix C at page 61, infra.

JURISDICTION

G & M Richmond, Appellant, appeals from the final judgment of the Supreme Court of Ohio, which left in force the decision of the Court of Appeals for Cuyahoga County, Ohio. The Court of Appeals decision reversed the trial court of Common Pleas finding that the City of Richmond Heights, Ohio, Single-Family District Zoning of Appellant's property was arbitrary, discriminatory, unreasonable and confiscatory, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and in violation of Sections 1 and 19 of Article I of the Constitution of the State of Ohio, as applied to Appellant's property.

The judgment of the Supreme Court of Ohio, dismissing the appeal from the Court of Appeals for Cuyahoga County, was entered on May 28, 1986. See

Appendix A, p.44, infra. A Notice of Appeal to this Court was duly filed in the Supreme Court of Ohio on the 14th day of August, 1986. See Appendix D, p. 69 , infra.

This appeal is being docketed in this Court within ninety (90) days from the overruling and dismissal of Appellant's Motion to Certify and claimed appeal as of right. The jurisdiction of this court is involved pursuant to 28 U.S.C. 1257 (2).

Since this proceeding draws into question the constitutionality of a statute of the State of Ohio, namely the Codified Zoning Ordinances of the City of Richmond Heights, and although the Attorney General of the State of Ohio, Anthony A. Celebreeze, Jr., was made a party hereto in the Amended Complaint filed in the Court of Common Pleas of Cuyahoga County, Ohio, no appearance was apparently made on behalf of the State

of Ohio, it is noted that 28 U.S.C. 2403 (b) may be applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "... nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law,...."

ARTICLE I: BILL OF RIGHTS OF THE CONSTITUTION OF STATE OF OHIO

> "§1 Right of freedom and protection of property
>
> "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." (See Const. 1802, Art VIII, §1.)

"19 [Inviolability of private property.]

"Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." (See Const, 1802, Art VIII, §4.)

Chapter 1135
OF THE CODIFIED ORDINANCES OF THE CITY OF RICHMOND HEIGHTS

"R-1 & R-2 Single Family Residential Districts

"1135.01 INTENT.

"R-1 and R-1 Single-Family Residential Districts are intended to regulate the use of dwellings and their accessory activities in relation to districts having compatible characteristics, and to regulate the density of the population to avoid congestion, maintain adequate services, obtain proper light, air and privacy, and to promote the most beneficial use of land in accordance with the Master Plan of the City.

"The regulations in this chapter shall apply to all R-1 and R-2 Districts. (72-72. Passed 8-31-72)

"1135.02 PERMITTED USES.

"In the R-1 and R-2 Districts, no building or structure or part thereof shall be erected, altered, moved or used, or land used, in whole or in part, except as otherwise provided in this chapter for one or more of the following specified uses:

(a) One-family dwellings.

(b) Farms; buildings erected, altered or moved onto farms shall conform to all provisions of this chapter.

(c) Churches.

(d) Public and private schools offering courses in general education and not operated for profit, publicly owned buildings, libraries and parks, after approval granted by the Planning and Zoning Commission upon a finding that the use complies with the standards and criteria as follows:

(1.) That the proposed use shall be in accordance with the objectives of the land use plan; shall be located so as to have access only on an arterial or secondary street; and may be located only on a local street provided that the extent and intensity of the proposed development will not substantially increase the volume and type of traffic movements on the local street;

(2.) That the proposed use is necessary to serve the neighborhood or the residential community at large; that the need cannot be served satisfactorily or that its environment would not be compatible (if located) in a nearby less restrictive district;

(3.) That the depth of the front yard and of the rear yard and the width of the side yards shall each be not less than 100 feet; and

(4.) That the location, design and operation of such use will not discourage the appropriate development or impair the value of the surrounding residential areas.

(e) Community buildings, golf courses, country clubs or similar civic or social clubs but not a residential club or a club operated as a commercial enterprise, after approval granted by the Planning and Zoning Commission upon a finding that the use complies with the standards and criteria as follows:

(1.) That the proposed use shall be in accordance with the objectives of the land use plan and shall be located so as to have access only on an arterial street or major thoroughfare;

(2.) That the proposed use is necessary to serve the neighborhood or the residential community at large; that the need cannot be served satisfac-

torily or that its environment would not be compatible if located in a nearby less restrictive district.

(3.) That the depth of the front yard and the rear yard and the width of side yards shall each be not less than 100 feet; and

(4.) That the location, design and operation of such use will not discourage the appropriate development or impair the value of the surrounding residential areas.

(f) Picnic grounds, athletic fields or similar areas for physical and outdoor exercises, and recreation areas which shall not be operated for a profit, provided such use is on open land and does not impair the residential appearance or character of such land, only after approval of the use and site development plan is granted by the Planning and Zoning Commission for a period not to exceed two years, upon a finding that the use complies with the standards and criteria as follows:

(1.) That the proposed use shall be in accordance with the objectives of the land use plan; shall be located so as to have access only on an arterial street or major thoroughfare;

(2.) That the proposed use is necessary to serve the neighborhood or the residential community at large; that the need cannot be served satisfactorily or that its environment

would not be compatible if located in a nearby less restrictive district;

(3.) That the subject property will act as a buffer or transitional area between a residential development and a nonresidential development;

(4) That the location, design and operation of such use will not discourage the appropriate development or impair the value of the surrounding residential areas; and

(5) That any capital improvements upon the subject property shall be of a temporary nature to preclude any unreasonable financial loss should the grant not be renewed upon expiration.

(g) Accessory buildings or uses customarily incident to any of the above permitted uses, such as private garages and open parking facilities, private gardens, recreational and storage uses and structures, pools, fences and walls. One private garage for each residential lot in which there can be housed a maximum of three passenger vehicles shall be considered a legal accessory use.

(h) A store, trade or business shall not be permitted as an accessory use except that the office of a physician, surgeon, dentist or musician may be located in the dwelling or apartment used by such physician, surgeon, dentist or musician as his private residence, and except that any person carrying on a customary home occupation may do so in a

dwelling or apartment used by him as his private residence, provided no persons other than members of his own household are employed in such occupation and no signboard other than window display is used to advertise such occupation.

(i) On a parcel of land of less than ten acres, the growing and selling of produce and the keeping of bees, animals and fowl shall be permitted under this chapter, provided the same is produced entirely on such parcels of land and does not become a nuisance or detrimental to the public health, general welfare or safety of the community.

(j) Animals, including fowl, other than pets, shall be housed in accessory buildings. No building or buildings shall be used or built for the housing or animals or fowl, other than pets, on the front half of any lot nor nearer than 175 to any adjoining dwelling, nor nearer than fifty feet to the dwelling of the owner thereof, and no animals which are or shall be in any way destructive, dangerous or detrimental to the public health, general welfare or safety of the community shall be kept, harbored or housed in any section of the City." (Ords. 72-72. Passed 8-31-72).

"1135.04 YARD, AREA AND BULK REQUIREMENTS.

(a) In R-1 and R-2 Districts, there shall be a front yard, a side yard on each side of every lot and a rear yard. Except as herein provided, the minimum widths and depths shall be as set forth in Chapter 1173.

(b) The height and bulk of buildings, the required minimum lot area, the minimum setback requirements, the minimum floor area and the maximum percent of the area of a lot that one-family dwellings together with accessory buildings may occupy shall be set forth in Chapter 1173.

(c) Accessory buildings shall occupy not more than seven percent of the lot area, and no portion shall approach nearly to a side or rear lot line than ten feet. Where a rear yard abuts upon a street (such lot is commonly known as a through lot) accessory buildings shall not occupy any of the minimum required rear yard space. On a corner lot, accessory buildings shall not occupy any of the minimum required side yard space abutting upon a street nor any of that portion of the rear yard lying nearer to the street than the width of the yard required on such lot and abutting on such street.

Except for a private garage, which shall not exceed one story of fifteen feet, all other buildings designed and intended as an accessory use shall not exceed eighty square feet of which the longest dimension shall not exceed ten feet. The maximum height shall be eight feet for a flat roof and eleven feet for a gabled, hip, mansard or gambrel roof. (Ord. 72-71. Passed 8-31-72).

STATEMENT OF THE CASE

I. CASE HISTORY

The case involves the question as to whether or not the Single-Family District Zoning of the City of Richmond Heights was arbitrary, discriminatory, unreasonable and confiscatory, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and in violation of Sections 1 and 19 of Article I of the Constitution of the State of Ohio, as applied to the subject property.

After a lengthy trial in the Court of Common Pleas, Cuyahoga County, Ohio, which included the testimony of thirteen witnesses and the admission of forty-six exhibits, the Common Pleas Court, using the evidentiary standard of "beyond fair debate," determined that the Single-Family zoning applied to the subject property was invalid and unconstitutional, and ordered the Defendant to rezone

the subject property. (Common Pleas Memorandum of Opinion, pg. 14, Pg. 82 Appendix C, infra and Common Pleas Judgment Entry, pg. 1, Pg. 84 Appendix C infra.) Subsequently, the Common Pleas Court overruled Defendant City's Motion for a New Trial.

Defendant City appealed the Common Pleas Court decision to the Eighth District Court of Appeals.

Following oral argument before the Court of Appeals, that Court, by a vote of two to one, reversed the decision of the Common Pleas Court, finding that the judgment of the trial court was against the weight of evidence" ...since the trial court usurped the legislative function of the city council..." (Court of Appeals Journal Entry and Opinion, Majority Opinion, Pg. 15, Pg. 60, Appendix B, Infra.) One judge issued a Dissenting Opinion (Dissenting Journal Entry and Opinion, page 62-68. See

Appendix B.

Appellant herein filed a Motion to Certify and to Appeal as of right from the decision of the Court of Appeals, Cuyahoga County, with the Supreme Court of Ohio. Said Motion to Certify and to file an Appeal as of right were denied.

Plaintiff-Appellant herein timely filed its Notice of Appeal and the matter is now before this Court.

II. STATEMENT OF FACTS

A. Location and Characteristics of the Property

The subject property consists of 122 acres of raw, rugged and vacant land in the City of Richmond Heights, located on the west side of Richmond Road, a major north-south arterial highway. The property has a frontage of 1,148 feet along Richmond Road and extends back, or to the west, to a depth of 3,950 feet.

The land is ravaged by four major ravines which traverse the site, cutting

the property into various sections and requiring the construction of a culvert and road to reach the rear portion of the land. Approximately one-third of the property is rendered useless for any purpose.

Some of the ravines extend to a depth of 95 feet and some are as wide as the length of a football field. These ravines and the rugged character of the land make it impossible to develop the land for single-family use. The ravines isolate the western portion of the land from the eastern portion, and separate the bulk of the land itself from the neighboring subdivisons, almost creating two islands of rugged forested land in the city. Trees twenty to forty feet high screen the property from residential areas.

On the other side of Richmond Road from the property is the Cuyahoga County Airport, a 650 acre facility which has

accommodated more than 1,000,000 flights of airplanes during the past ten years. Many of the planes using the field are jet planes. The airport has major navigation aids which include an Air Traffic Control Tower, Instrument Landing System, a High Intensity Approach Lighting System and a Visual Approach Slope Indicator. More than 250 acres of land zoned for Commercial and Industrial use are available on, and adjacent to the airport. A 98 acre office industrial park is currently under construction on this property, with access to Richmond Road directly in front of the subject property.

The airport itself, a grass landing strip in 1928, after being closed during World War II, grew to the major jetport it is today.

In the general five-community area of Richmond Heights, Highland Heights, Mayfield Heights, Lyndhurst and South

Euclid, there is no appreciable demand for single-family development in this area, while there is a great and urgent demand for commercial and industrial development.

No sanitary sewers are available to the site, and any development must include the construction of a package plant to provide sanitary sewer facilities.

B. Development Costs

Projected sales value of finished lots were $18,000 for the 50 untreed lots and $22,000 over the treed lots. The gross return for the sale of these lots over a period of 7.8 years, if they could be sold in that period of time, would be $4,288,000. Development costs would be $5,919,909, thus producing a loss of $1,631,909 without including original land costs or profit to the developer.

The loss is further compounded into a greater financial disaster, since all of the 204 lots could not be sold within 7.8 years. Because the subject property is the least desirable for single-family development of the 900 acres of undeveloped single-family zoned property in the area, it would take at least 45 years, or more, before the market could reach the subject property. This would delay development of the subject property well into the 21st century.

Such a delay constitutes confiscation.

C. Plaintiff's Expert Witness

Property Economist Ritley made a study and analysis of a five community area including Richmond Heights.

Ritley testified that nine hundred acres of single family lots remain to be absorbed in the four neighboring subdivisions. 2,919.16 acres of vacant

single family zoned land remain to be developed in the study area.

Only four building permits were issued in Richmond Heights in 1982 and persons per household declined. In addition to the subject land, there were 2,919.16 acres of vacant land zoned residential in the study area, and only a 60 acres per year absorption rate (a fifty year sell out) existed in the study area.

In a neighboring subdivision started in 1974, 55 acres of unplatted land and 20 finished lots remained unsold, even though original sales prices declined from $21,000 per lot to $15,500 in 1983. Other subdivisions still had great percentages of finished lots unsold.

Because of the over supply of lots, the subject property, if developed into single family lots, is not salable for single family. Single family is not a reasonable, logical or economic alterna-

tive. There is no reasonable or justifiable benefit to the community to retain single-family zoning.

Factors impeding development of the subject land are the adjacency of the airport, its continuing expansion, 2,108 acres of vacant residentially-zoned land in Highland Hts. and Richmond Hts., the topography, and high financing costs, all brought about by the incredible changes in the area which was basically wide open spaces, when zoned single family in 1929.

Present single family zoning is unreasonable and of no benefit to the city.

Richard Van Curen, prominent real estate appraiser, stated the negative factors influencing the property, thus militating against single-family development are the airport across the street, less expensive homes flanking the property, Richmond Road, topography,

reduced demand for new homes and lack of sanitary sewers.

Drastic changes since 1929, when this property was first zoned single-family, are growth of the airport from a grass strip landing field to a jet port with sophisticated landing devices, accommodating more than 100,000 flights annually, construction of I-90 and I-271 affording quick access to the United States Freedom System, industrial development in and around the airport, and the designation of Richmond Road as a major north-south arterial highway.

It would not be reasonable to maintain single-family zoning because the property could not be sold for such use. The noise of the jets is deafening.

Allen Fonoroff, university professor of planning, testified about the changed circumstances since 1929 when property was first zoned single-family, which

included growth of the airport from a grass landing strip to a major regional jet runway, industrial development on the airport site and adjacent thereto, decline in building permits issued, population changes, increase in demand for multiple dwellings and the decline of number of persons per household.

Since the land did not lend itself to single-family development because of the ravines and cost of development, the single-family zoning is not reasonable. There is no benefit to the city to keep it zoned single-family.

In balancing the benefits and detriments of single-family zoning, such zoning is an unreasonable burden to place on the property owner.

This is no mere economic loss. It is confiscation contrary to the United States Constitution and the Ohio Constitution.

THE QUESTION IS SUBSTANTIAL

a.

There is a continuing conflict between landowners with various municipalities, planning commissions, and other Governmental Agencies as to the best and most economical use of development of land. Many of the restrictions preventing the most appropriate use as in the instant case where the land was first zoned for Single-Family Residences in 1929, no longer reflect the reality of the development of adjacent land or the economic realities of building costs today. Many zoning and building restrictions constitute an actual taking of the land without actual legal condemnation procedures, when, as in the instant case, such zoning restrictions prevent even a "break-even" possibility of use or develop-

ment of the land as presently zoned. New clear cut guidelines are needed.

Ohio has held until the instant case that a municipality may not lawfully restrict the development of private land "... where no economically feasible use of such land may be made under the existing zone designation..." State ex. rel. The Killen Realty Co. v. East Cleveland (1959), 169 Ohio St. 375 (Syllabus paragraph 3) (Emphasis added). Justice Peck, speaking for a unanimous Court, noted that "... restrictions imposed must stop short of imposition as a means of establishing economic fiat as opposed to a mere limitation of land use." 169 Ohio St. at 385 (Emphasis added) The record herein, if and when objectively reviewed in accordance with correct legal standards, as aforesaid, disclose, in a very graphic form, the same type, form, scope and magnitude of "economic fiat" proscribed by Killen,

supra.

The Ohio Supreme Court's continuing and consistent focus upon the physical and practical realities of land usage, in the face of restrictive and highly limited zoning restrictions, was again articulated in Superior Uptown v. Cleveland (1974), 39 Ohio St. 2d 36. In affirming the lower court's holding that the zoning ordinance at issue therein was unconstitutional, the court found that, "... it was very doubtful that appellee could, within the foreseeable future, effectivey develop its land under local... zoning..." 39 Ohio St. 2d at 39 (Emphasis added). Similarly, appellant herein proved, beyond any fair or reasonable debate or dispute, that it could not "effectively develop" its ravine-ravaged property on the flight path of Cuyahoga County Airport for single family residential usage at any time in the foreseeable future. See

also, Alsenas v. Brecksville, 29 Ohio App 2d 255 (1972), which held that projected loss of economic value is a "very important factor" in any determination as to the constitutionality of a restrictive zoning ordinance such as that involved herein. 29 Ohio App. 2d at 261.

Most recently and most significantly, the Ohio Supreme Court carefully applied many of the same physical and economic factors present herein in upholding the lower court's finding of unconstitutionality of a single family zoning restriction upon topographically unique land located in a changing and developing area. Mayfield-Dorsh, Inc., v. South Euclid, 68 Ohio St 2d 156 (1981) In this situation, like that in Mayfield-Dorsh, "... the unique topography of appellees' land requires, from a practical and economical perspective, a special configuration of structures.."

68 Ohio St. 2d at 159 (Emphasis added). Further, it was noted that the subject property therein was located on "... a major east-west, five-lane thoroughfare accommodating a heavy traffic flow..." 68 Ohio St. 2d at 157. Appellant's property is similarly situated on a major north-south thoroughfare, Richmond Road, which also handles a heavy flow of vehicular traffic day in and day out.

The foregoing practical and economic factors led the Ohio Supreme Court to hold that single family residential zoning applied to property closely analogous, from a physical and practical perspective, to that involved herein" ... would be unsound, uneconomical, unsafe and unimaginative..." 68 Ohio St. 2d at 159. Further, "... cases where one party unambiguously demonstrates, with a massive amount of evidence, the invalidity of a zoning classification mandate meaningful

judicial review." 68 Ohio St. 2d at 159.

Appellant does not mean to suggest, by its foregoing recitation of cases, that proven and debilitating economic loss under existing zoning restrictions, in and of itself, requires a finding of invalidity of such restrictions. By the same token, however, massive evidence of severe economic and practical hardship imposed upon the owner of private property by virtue of antiquated and impractical zoning limitations cannot lawfully be casually waved away and shunted aside merely because a reviewing court is enamored with the "picturesque topography" of the economically stagnating property.

The majority of the Eighth District Court of Appeals herein gave no consideration to the Ohio Supreme Court's significant and controlling decision in Mayfield-Dorsh, nor did it even approach

the issues before it from a "practical and economic perspective" as mandated thereby. Under such circumstances, "meaningful judicial review" can only be achieved by this Court's accepting the within matter for review.

It is, of course, constitutionally impermissible for a governmental agency to take or confiscate private property without just compensation. The Fifth and Fourteenth Amemdments to the U.S. Constitution provide, of course, that no person can be deprived of his property without due process of law. In this case, Plaintiff-Appellant clearly and markedly proved that the City's residential zoning restriction, as applied to its property, does constitute such an unconstitutional deprivation. Of like effect, Article I, Section 1 of the Constitution of the State of Ohio insures that all citizens of this state, including Plaintiff-Appellant herein,

have the "inalienable right" of "... acquiring, possessing, and protecting property..." Further, Article I, Section 19 of the Constitution of the State of Ohio provides that where private property is "taken' for public use, "... a compensation therefor shall first be made..." All of these long-standing and time-honored constitutional protections and guarantees are extinguished where, as here, a municipality unreasonably and arbitrarily locks private property into a completely unproductive and irrational use category.

A confiscation can be direct or indirect, such as the case herein where a zoning restriction, from a practical perspective, dooms private property to a state of eternal stagnation. See, for example, Superior-Uptown, supra. While the majority of the Court of Appeals did not address the confiscation issue herein, Judge Patton, in dissent, approached

it head on.

Noting that the subject property "... has remained essentially dormant since 1919..." while other neighboring properties not similarly situated; i.e., not torn apart by monstrously long and deep ravines, had been developed for residential uses, Judge Patton logically concluded that (Emphasis added) "... the topography of the land itself has been and will continue to be an insurmountable obstacle to developing this property with single-family homes." (Dissenting Opinion of Judge Patton, page 4, See Appendix B) (Emphasis in original) Accordingly, Judge Patton necessarily concluded that appellee's R-1 zoning, as applied to appellant's uniquely situated property "... is confiscating and constitutes a taking of property without just compensation in violation of the Fifth Amendment." (Opinion of Judge Patton, page 4,

Appendix B)

This analysis closely follows and is totally consistent with the Ohio Supreme Court's recent ruling in Negin v. Bd. of Bldg. and Zoning Appls. (1982), 69 Ohio St. 2d 492. Therein, the court considered other suggested uses for the property at issue therein and found that such "...suggested uses are so illusory and unlikely as to render Sublot 728 effectively useless." 69 Ohio St. 2d at 496. Applying the same practical approach that it utlized in Mayfield-Dorsh, supra, this Court held as follows:

> "The rendering of such a lot useless for any practical purpose goes beyond mere limitation of use and becomes a confiscation." 69 Ohio St. 2d at 497 (Emphasis added)

From both a physical standpoint, as emphasized by Judge Patton, and an economic standpoint, as convincingly demonstrated on the record herein, appellant's property will similarly be

"... useless for any practical purpose..." if it is to be indefinitely subjected to appellee's R-1 zoning. That appellee herein desires to perpetuate its 57 year old zoning classification, as applied to appellant's property, and was able to hire a so-called expert to rubber stamp its position cannot change or alter the proven fact that single family homes have not been and cannot effectively and practically be built on this property.

No land developer, appellant included, can be expected to incur substantial costs and expenses unless he has the reasonable prospect for ultimately recouping his costs and a fair return on his investment. While a developer has no legal right to any particular margin of profit, he does have a legal and constitutional right not to have his land taken without just and fair compensation thereof. (Article I, Section 19,

Ohio Constitution, and Fifth Amendment and Fourteenth Amendment, United States Constitution. The decision by the majority of the Court of Appeals, Cuyahoga County, below erroneously sanctions the obvious confiscation of Appellant's property, in direct conflict with the rule of Negin, supra, and should accordingly be overturned by this Court.

Accordingly, for this and many other cogent reasons referred to herein, this case should be reviewed by this Court.

The sharp contrast, in both substance and approach between the majority Court of Appeals opinion, on the one hand, and the trial court and dissenting Court of Appeals opinions, on the other hand, also reflect the current need to have this Supreme Court clarify, with as much precision as possible, what is and is not constitutionally impermissible zoning, when applied to topographically

unique private property, so that municipal authorities and land owners (or potential land owners) alike, can be in a position to accurately access their rights and responsibiliies in significant land use or land acquisition decisions.

If one salient goal of the legal process is to give direction to those charged with a public responsibility, such as a municipal zoning authority, to act reasonably and fairly, then this matter must be reviewed, because not to do so could easily induce irresponsible conduct. On reading the majority opinion of the Eighth District Court of Appeals, a zoning board or authority could rationally conclude that the law carefuly developed by this and other courts as to the constitutional effect of arbitrary, unreasonable and capricious zoning restrictions could be effectively nullified. Some eight (8)

years ago, Judge Krenzler for the Eighth Appellate District Court of Appeals in Central Motors Corp. v. Pepper Pike, 63 Ohio App 2d 34 (1979), specifically warned against placing too much reliance upon expert opinions in resolving constitutional issues. Now another panel of that same court has departed from the logic of that case, and a review of the subject at this time by the Court would clearly be in the public interest.

Finally, the gnawing question as to what constitutes a constitutionally flawed indirect or de facto confiscation of private property by zoning fiat or zoning intransigency really lies at the heart of this case. How far can a municipality go in retaining historically undevelopable raw land within is boundaries despite significant social and physical changes within the community over the years? At what point does land

which is practically useless for any economic purpose or activity, as restricted, become "taken" or confiscated? These and other inter-related questions of great public interest can be addressed and decided in this matter. The opportunity is now ripe to expand thereon in the face of the record herein which shows how dogmatic adherence to outdated and impractical zoning ordinances can literally and actually destroy the value of private property.

The substantial questions that permeate this matter are, we suggest, virtually self-evident. As a clear principal of constitutional law, an owner of private property cannot be arbitrarily and unreasonably divested of the enjoyment, use and benefit thereof. Due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 1 of the Ohio Constitution, assures the

owners of private property that they cannot be stripped of the value thereof by mere municipal fiat, whim or caprice. This case, at its core, involves the question of whether a municipality transgresses the aforesaid constitutionally protected rights of a private property owner when it perpetuates antiquated zoning restrictions that bear absolutely no rational relationship to any current public needs or interests. That is a critical question that is eminently ripe and proper for resolution herein.

The instant case is a perfect opportunity for this Court to apply the principles set forth in the first syllabus of Agins v. Tiburon, 447 US 255, 100 S Ct. 2138, 65 L Ed 2d 106, 107 (1980) which states:

> "Eminent Domain §98 - zoning ordinances - limitations on development - Fifth Amendment - "taking"

> "1a, 1b. A city's zoning ordinances which place privately owned land in a zone limited to single-family dwellings, accessory buildings, and open-space uses, and which permit the owners to build between one and five single-family residences on their five-acre tract, do not on their face take the owners' property without just compensation in violation of the Fifth and Fourteenth Amendments, where (1) the ordinances substantially advance the legitimate governmental goal of protecting the city's residents from the ill-effects of urbanization and (2) the ordinances neither prevent the best use of the owners' land nor extinguish a fundamental attribute of ownership."

The zoning ordinance herein under consideration does not substantially advance any legitimate government interest in protecting the city's residents from the ill effects of urbanization. On page 6 of the Trial Court's Opinion, (see Appendix C) which this question was met head-on as follows:

"The Court is aware of the concerns of citizens who own homes in the bordering streets. Some of these streets now

end at the Euclid Creek ravine and the ravines surrounding the Plaintiff's land. Dense woodland is part of the scenery and it provides both beauty and seclusion for the residents. But at trial, there was no evidence that the screening between the present streets and the property would be lost and homeowners would be forced to look at unattractive buildings. As stated in Euclid v. Ambler Realty Co., (1926), 272, U.S. 365: (full citation added)

> "Thus, the question whether a power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered a part, but by considering it in connection with the circumstances and the locality".

The three-pronged test, which the party challenging a zoning ordinance must meet, that is, the zoning classification must be beyond fair debate: (1) unconstitutional, (2) unreasonable and (3)

not substantially related to public health, safety, morals or general welfare, has been met. The courts have repeatedly ruled that zoning is, in the first instance, committed to the judgment and discretion of the legislative body. However, cases where one party unambiguously demonstrates, with a massive amount of evidence, the invalidity of a zoning classification mandate meaningful judicial review. This is one of those cases."

In this case, the Trial Court found that it is beyond fair debate that the property is improperly zoned and is unconstitutional.

Likewise in the instant case, the zoning ordinance effectively prohibits and prevents the best use (or in effect, any use except as a relic of some "Robber Baron's" use as a castle fortress), and extinguishes to all intent and purpose the development of the land

which is certainly a fundamental attribute of ownership, when taking into consideration the use of adjacent and property in close proximity to Appellant's land.

SUMMARY

b.

Accordingly, Appellant hereby requests that its Motion to Certify be granted so that the significant legal and constitutional issues that are now ripe for adjudication can be decided.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

WILLIAM F. SNYDER

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Attorneys for Appellant

APPENDIX A

THE SUPREME COURT OF OHIO
COLUMBUS

1986 TERM
To wit: May 28, 1986

G & M Richmond, Appellant	:	Case No. 86-489
	:	E N T R Y
v.	:	
	:	
City of Richmond Heights	:	
Appellee	:	

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:
Motion Fee, $20.00 paid by Joseph W. Bartunek.

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to-wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date_____

JAMES WM. KELLY CLERK
DANIEL J. CROWLEY DEPUTY

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

G & M Richmond, Plaintiff-Appellee:	:	
	:	JOURNAL ENTRY
vs.	:	AND
	:	OPINION
City of Richmond Heights Defendant-Appellant:	:	

DATE OF ANNOUNCEMENT OF DECISON: JAN 30, 1986

CHARACTER OF PROCEEDING:

JUDGMENT: Civil Appeal from Court Common Pleas - C.P. 82-37447
Reverse.

DATE OF JOURNALIZATION

APPEARANCES:

For Plaintiff-Appellee: Joseph W. Bartunek, Esq.
950 Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114

For Defendant-Appellant: Charles E.Merchant, Esq.
K. J. Montgomery, Esq.
One Erieview Plaza
Suite 1101
Cleveland, Ohio 44114

KRUPANSKY, J.:

On January 5, 1982 Plaintiff, G & M Richmond, filed a complaint against defendants, City of Richmond Heights and others seeking declaratory judgment, mandatory injunction and other equitable relief concerning the zoning of certain property situated in Richmond Heights owned by plaintiff. Defendants filed an answer of March 5, 1982. On January 6, 1984 plaintiff filed an amended complaint for declaratory judgment and other relief against defendants, City of Richmond Heights and Anthony J. Celebreeze, Jr., Attorney General of the State of Ohio. Defendant, City of Richmond Heights, filed an answer on January 20, 1984.

Trial commenced on January 26, 1984. On September 24, 1984 the trial court entered judgment in favor of the plaintiff and in its memorandum of opinion the trial court concluded, "it

is beyond fair debate that the [subject] property is improperly zoned and is unconstitutional." In addition, the trial court gave notice to the zoning authority it may rezone the property within a reasonable period of time or the court will authorize the property owner to proceed with a proposed use.

Defendant, City of Richmond Heights, filed a motion for new trial on October 4, 1984. On October 19, 1984 the trial court denied defendant's motion for new trial. Defendant, City of Richmond Heights, filed a timely appeal on November 16, 1984.

The subject property consists of 122 acres of wooded, undeveloped land located on the west side of Richmond Road in Richmond Heights, Ohio. The property is irregularly shaped. Deep ravines both surround and run through the land; the largest ravine runs roughly through the center of the

property and cuts the property in half horizontally. As a result, in order to use this property for any purpose, a culvert and a road must be built to connect the two portions of the land. In addition, due to the presence of the ravines, approximately one third of the land cannot be developed at all.

Subdivisions of single-family residences flank the land to the north and to the south. To the southwest of this property is a large residential subdivision known as the Scottish Highlands. A ravine runs along the boundary of the subject land and the Scottish Highlands subdivision. The homes located in the Scottish Highlands subdivision are built on terrain similar to the terrain of the subject property. The Cuyahoga County Airport, which now accommodates approximately 100,000 flights per year, is located across the street from the subject land on the east

side of Richmond Road.

Richmond Heights is primarily a residential area; the two major exceptions are the airport and the Richmond Mall. There is a small industrial area south of Highland Road at the west end. In addition, there are also clusters of commercial uses at the interesection of Richmond and Highland Roads as well as on Chardon Road both east and west of Richmond Road. Land owned by the airport located across Richmond Road from the subject property is targeted for industrial expansion.

The subject land was originally zoned, R-1 for single-family residences in 1929. In 1964, when a master plan was adopted, and again in 1972 and 1980, the zoning designation of this land was reconsidered and each time the R-1 designation was left unaltered.

The testimony given by the appellee's key witness at trial was as

follows: Richard Van Curren, a real estate appraiser, testified the location of the property is a factor in favor of the single-family residential zoning. However, the presence of the airport, the topology of the area and the lack of a sewer system are factors which weigh heavily against the R-1 zoning designation. He stated there have been drastic changes in the area since 1929, i.e., the increased number of air flights flying in and out of the Cuyahoga County Airport. Consequently Van Curren concluded an industrial park is a feasible use of this land while the development of single-family residences on this property is not feasible.

Mr. Allen Fonderoff, Chairman of the Department of Urban Studies and Planning at Virginia Commonwealth University, testified the property does not lend itself to residential use because of the cost of developing the

land. He also stated the R-1 designation places an unreasonable burden on the property owner. Fonderoff stated the City would not benefit if the R-1 zoning was retained; however, if the property was zoned for industrial use the City would benefit from higher taxes. Fonderoff concluded the single-family residential zoning is unreasonable.

Mr. Wayne Gerl, a general contractor, testified, even with a seven or eight-year sellout period, appellee would sustain approximately a $1,600,900 loss.

Mr. Roger D. Ritley, a real estate consultant and appraiser, testified the topography, high development costs and affordability factors rendered the land unsuitable for the development of single family residences. He estimated it would take 40 years to sell this land for single-family residential purposes.

Appellant's key witnesses gave the

following testimony at trial. Mr. Gabriel Mellini, a Richmond Heights resident and a real estate agent for 19 years, testified there is a demand for the more expensive Gates Mills type homes in Richmond Heights. He further testified homes built near ravines are marketable. In Mellini's opinion, the industrial zoning designation would mean a decrease in the value of the surrounding property and an increase in traffic congestion in the area.

Mr. Robert Parry, a City Planner with the Regional Planning Commission, testified people still have an interest in living in the Richmond Heights area. Parry stated, while the noise from the airport is a major consideration, the noise does not make the area unlivable or even less livable than other locations. Parry stated the community does not need industrial zoning since there is undeveloped land in Richmond Heights

zoned for industrial use which is still undeveloped. He also testified the industrial zoning designation would bring additional traffic to the area, intrude on established residential subdivisons and alter the aesthetic beauty of the area. Parry concluded the present R-1 zoning is both reasonable and appropriate; the proposed industrial zoning is inappropriate.

I.

Appellant raises four assignments of error on appeal. They will be addressed together since all four assignments of error raise essentially the same questions, viz., whether the trial court was correct in holding the R-1 zoning of the subject property improper and unconstitutional and beyond fair debtate (sic). Appellant's four assignments of error are as follows:

1. THE TRIAL COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THE JUDGMENT OF THE CITY COUNCIL ON MATTERS WHICH WERE CLEARLY DEBATABLE.

2. THE TRIAL COURT ERRED BY RELYING SOLELY ON ECONOMIC LOSS AS A BASIS TO OVERTURN THE RICHMOND HEIGHTS ZONING CLASSIFICATION.

3. THE TRIAL COURT ERRED BY FINDING THAT THE ZONING CLASSIFICATION WAS NOT SUBSTANTIALLY RELATED TO THE PUBLIC HEALTH, SAFETY, MORALS AND GENERAL WELFARE.

4. THE JUDGMENT OF THE TRIAL COURT IS AGAINST THE WEIGHT OF THE EVIDENCE.

Appellant's four assignments of error have merit.

Ohio law with respect to the Constitutional validity of zoning ordinances is clearly established: The legislative enactment is entitled to a presumption of validity. Brown v. Cleveland (1981), 66 Ohio St. 2d 93; Pepper Pike v. Landskroner (1977), 53 Ohio App. 2d 63. The challenging party has the burden of proving beyond fair debate that the zoning ordinances is unreasonable, arbitrary, confiscatory and not substantially related to public health, safety, morals and general welfare. Village of Euclid v. Ambler

Realty Co. (1926), 272 U.S. 365; Central Motors Corp. v. Pepper Pike (1979), 63 Ohio App. 2d 34.

This Court elaborated on the "beyond fair debate" standard in Central Motors Corp. v. Pepper Pike, supra, in the following manner:

> "The validity of a zoning ordinance is fairly debatable if reasonable minds may differ. A mere difference of opinion is not sufficient to make the issue of validity of a zoning ordinance fairly debatable because it is relatively easy for a property owner and a municipality to obtain the services of expert witnesses who will have differing opinions as to the validity of a zoning ordinance. The fairly debatable rule must concern itself not with mere words or expressions of opinion, but basic physical facts pertinent to the issue of the validity of the zoning ordinance. (Emphasis added)
>
> "Where it appears that from all the facts that room exists for a difference of opinion concerning the reasonableness of a zoning classification, the legislative judgment is conclusive. Within reasonably debatable areas of judgment and policies, courts will not attempt to decide what ought to be done or not done by local zoning authorities. Only where illegality is clearly demonstrated or where the ordinance is arbitrary, unreasonable or discriminatory is judicial interference warranted."

(Emphasis in original)

A review of the record in the case sub judice establishes the R-1 zoning classification for the subject property is fairly debatable. Appellee failed to fulfill its stringent burden of proof. The trial was in essence a battle of experts. Appellant's experts testified the present R-1 zoning designation is reasonable and appropriate while appellee's experts countered with testimony the single-family residential classification is not feasible. Thus, the evidence presented at trial established reasonable minds differ on the issue of the reasonableness of the zoning ordinance.

Furthermore, in Central Motor Corp. v. Pepper Pike, supra, this court found the plaintiff had demonstrated: (1) its property was unique in contrast to the remainder of the property in Pepper Pike, (2) the costs of improvements

would outweigh the fair market value of the property if used for single-family residences, thus plaintiff could not develop its land profitably for single-family use and (3) the circumstances in the surrounding area had changed substantially, i.e., the presence of I-271 and numerous commercial developments, and thus, the plaintiff had met its burden of proof. The case sub judice is factually distinguishable from Central Motor Corp. v. Pepper Pike, supra. At trial the only factor appellee proved was the economic loss it would incur as a result of the existing zoning ordinance. Economic loss alone is not a sufficient reason to declare a zoning provision unconstitutional. Alsenas v. City of Brecksville, (1972), 29 Ohio App. 2d 255; Central Motors Corp. v. Pepper Pike, supra. Appellee presented no evidence which demonstrated the ordinance was arbitrary, confiscatory

and not substantially related to the public health, safety, morals and general welfare.

The fact appellee could reap substantially larger profits by developing the property for industrial purposes does not justify destroying the picturesque topography of the area. Despite the growth of the nearby Cuyahoga County Airport, the areas immediately surrounding the subject property remain residential neighborhoods. The homeowners in these surrounding areas invested in their homes with the expectation the natural beauty of the area would not be invaded by the establishment of an industrial complex in their backyards.

Furthermore, when they purchased their homes these people did not anticipate the increased traffic which would accompany the development of this land for industrial use. The subject property is connected to Richmond Road

by only a corridor of land which is flanked to the north and south by residential neighborhoods. Thus, all of the traffic seeking ingress and egress to the subject property must of necessity flow through this single corridor thereby diminishing the value of the surrounding residential property.

The appellee purchased the subject land with full knowledge it was zoned for single family residential use. This land was originally zoned for residential purposes in 1929. A master plan was developed in 1964 and the residential designation was retained. In addition, as recently as 1972 and 1980 this zoning ordinance was reevaluated and left intact.

Regardless of the use for which this land is developed, the topography will create problems. The fact the nearby Scottish Highlands residences are built on similar terrain indicates such land

is desirable for and can be successfully developed for single family residences.

The commercial development occurring in Richmond Heights is taking place in areas of the community removed from these residential areas. In addition, undeveloped land zoned for industrial use exists in other areas of Richmond Heights.

The above facts establish the inappropriateness of placing an industrial complex in the middle of a residential area. Thus, the validity of the challenged zoning ordiance is fairly debatable. The judgment of the trial court is against the weight of the evidence since the trial court usurped the legislative function of the city council when the court substituted its judgment for that of the city council on issues which were clearly debatable. Appellant's assignments of error are sustained.

Judgment reversed.

It is, therefore, considered that said appellant recover of said appellee costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PARRINO, P.J. CONCURS.
PATTON, J. DISSENTS.

(See Dissenting Opinion attached.)

Judge
BLANCHE KRUPANSKY

N.B. This entry is made pursuant to the third sentence of Rule 22 (D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, a which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

G & M Richmond, Plaintiff-Appellee:	:	DISSENTING
	:	JOURNAL ENTRY
vs.	:	AND
	:	OPINION
City of Richmond Heights Defendant-Appellant:	:	

DATE OF ANNOUNCEMENT OF DECISON JAN 30, 1986

PATTON, J., DISSENTING:

I respectfully dissent from the majority opinion. While I agree that the party challenging the constitutionality of a zoning ordinance has the burden of proving beyond fair debate that the ordinance is unreasonable, arbitrary, confiscatory and not substantially related to public health, safety, morals and general welfare, I believe the plaintiff-appellee in this case had met that burden. The majority states, and I agree, that economic loss

alone is not a sufficient reason to declare a zoning provision unconstitutional. Alsenas v. City of Brecksville (1972), 29 Ohio App. 2d 255. The majority holds however that the only factor appellee proved was the economic loss it would incur as a result of the current zoning provision. I disagree. My review of the record shows that appellee established several factors, in addition to the economic losses it would sustain, which support the trial court's finding that the R-1 residential zoning ordinance was unconstitutional. Therefore, I would affirm.

One such factor, and one which was critical in Central Motors Corp. v. Pepper Pike (1979), 63 Ohio App. 2d 34, is proof of substantial and significant changes in the immediate area of the subject property. The property was zoned for single-family residential development in 1929. At that time, the

Cuyahoga County Airport was a grassy landing strip which accommodated small pleasure craft. Today, the Cuyahoga County Airport is a major corporate jet port accommodating over 100,000 jet craft annually. The increase in air traffic and the changes in the type of aircraft flying into and out of the county airport has created a significant increase in the level of noise over and around the subject property. Additionally, although the area immediately around appellee's property has developed as and remained single-family residential, the development of the airport has caused a rezoning of property to the south, east and north of the airport to industrial uses. Also since 1929, two major interstate highways (I-271 and

---

Although appellee produced evidence that a house in the direct flight path of the airport sold for $139,000, such evidence is not dispositive that 200 new houses developed in the subject property will also sell for $139,000.

I-90) were built within a few miles of appellee's property. As a result of that change, coupled with the location of the airport, Richmond Road has become a major arterial highway. Richmond Road is continually under consideration by the county and the state for being widened from a two-lane to a four-lane highway. The changes in the volume and type of air traffic from the county airport, in the volume of automobile traffic on Richmond Road, and in the zoning of properties around the airport to industrial uses from 1929 to the present constitute a valid change in

---

The proposed plans for developing the subject property under the R-1 zoning includes several homes with frontages on Richmond Road. With the high volume of automobile traffic and its concomitant dangers, the inevitability that Richmond Road will become a four-lane highway, and the location of the airport across the street, it is unlikely that any of these properties on Richmond Road would be sold.

circumstances under Central Motors v. Pepper Pike, in additon to the economic loss appellee would suffer, to show that the 56-year-old zoning ordinance is arbitrary, unreasonable and unrelated to the public health, safety and welfare.

In addition to these external factors, the topography of the land itself must be considered in this case. There is no question that deep ravines surround the property on three sides and at one point cut through it and that a culvert would need to be built in order to develop the western portion of the property. Even with the culvert, one-fourth to one-third of the property would remain undeveloped, however. Furthermore, this property, ravaged by the deep ravines, has not been developed under its R-1 zoning and has remained essentially dormant since 1929, while surrounding properties not ravaged by ravines were developed as residential.

This indicates to me that the topography of the land itself has been and will continue to be an insurmountable obstacle to developing this property with single family homes. A zoning ordinance which restricts development of property to single-family homes in such a case is confiscatory and constitutes a taking of property without just compensation in violation of the Fifth Amendment.

There was evidence that the Scottish Highlands developement to the southwest of the subject property is surrounded by ravines but that it nevertheless was profitable developed under the R-1 zoning. The ravines in that, development, however, were confined to the permimeter (sic) of the property and did not create the problem where, as with the subject property, one-fourth to one-third of the overall acreage would be lost to the ravines.

As stated above, the standard to be applied in determining constitutionality of a zoning ordinance is whether the municipality's power to zone has been exercised in such an arbitrary or unreasonable manner so as to be in violation of constitutional guarantees and whether the ordinance bears a real and substantial relationship to the public health, safety, morals and general welfare. Based upon my review of the record, I cannot say that the trial court substituted its judgment for that of the city legislature. I believe that appellee has shown beyond fair debate that the R-1 zoning ordinance is invalid and unconstitutional. Therefore, I respectfully dissent.

APPENDIX C

STATE OF OHIO) IN THE COURT OF COMMON PLEAS
)
) SS:
CUYAHOGA COUNTY) CASE NO. 82-037447

G & M RICHMOND)
)
Plaintiff) MEMORANDUM OF OPINION
)
-vs-)
)
CITY OF RICHMOND)
HEIGHTS, et al.)
)
Defendants)

Norman A. Fuerst, J.:

This is an action for Declaratory Judgment brought under Chapter 2721 and Rule 57 and by owners of property located in the City of Richmond Heights, Ohio. The property is located on the west side of Richmond Road, opposite the Cuyahoga County Airport and consists of 122 acres of wooded, undeveloped land. Originally zoned for single-family homes, the subject area has remained undeveloped since 1929. The zoning designation was considered in a Master Plan adopted in 1964, reviewed again in 1972 and 1980. Surrounding it and adjacent are the Fairlawn

subdivision of 33 existing homes on the south and the Mavec Landcaster Estates subdivision of 117 homes on the north. On the Southwest Highlands subdivision are 167 existing homes of which 31 homes abut the subject property. There is no industrial or commercial development in the western area. However, across Richmond Road, a two-lane state highway, land is being readied for industrial expansion on large tracts of land owned by the airport. The airport, built in 1928, has grown to a busy field, with some large jets in service for corporate clients. The industrial use of this area cannot be limited by either the Zoning Board or the City Council of Richmond Heights. However, as to the subject land, a request for rezoning has been refused, thus opening the way for this action.

Although the exhibits define the terrain with some precision, it is noted that the land is surrounded by deep ravines. A culvert and road must be constructed to connect

the rear portion of the land and nearly a third of the land is not usable for any development.

Given the loss due to the ravines, the number of single-family buildable plots is about 200. The single-family homes existing in the Scottish Highlands are on a similar terrain.

Entwined with the issue of feasibility of constructing single-family homes is the question of present demand for housing. In early 1984 there were about 54 sublots available in Richmond Heights for single homes. About 55 acres were also available for future development. By comparison, 850 acres are available in the adjoining community of Highland Heights. Intending to show a lack of demand and an oversupply of lots, plaintiffs expert testified that based upon the number of yearly building permits since 1980 and the available land for single homes, it would take over 40 years to use those lots. The experts' differences over absorption rate (8

years to 12 years) are not of great significance on this issue. To make the plaintiff's land feasible for single-family homes, the sales would have to far exceed yearly those previously marketed. The conclusion of the Ritley report is that given the the above factor together with the costs of development (to be discussed) would lead to a loss to the owners.

A voluminous report was submitted by Roger Ritley. Tracking the history of sales in four subdivisions, he testified that the velocity of sales had slowed in those projects and the projection would be for a slow absorption of the subject property if developd into single families. Part of this opinion is based on the unaffordability to the average family and the development of the airport into other than single homes. Also that the increased number of flights (110,000) make it less desirable.

Testimony from a Councilman suggested that the land could easily sell for single

homes of Gates Mills' type. However, in that community there is a two-acre minimum lot size compared to the one-thid acre size in Richmond Heights. Based on recent sales, there would be little market for those more expensive homes. In nearly (sic) parcels, homes sold for $80,000 (Landcaster Estates) and $80,000 - $100,000 (Fairlawn). The Van Curen report gives an opinion that single-family development is not reasonable because of the airport, topography, reduced demand for new homes and the less expensive homes flanking the property. It further claimed that the "hard costs" for a lot in the plaintiff's development would be too high for the market. ($26,700 to $28,400).

Allen Fonoroff, having viewed the layout for single-family dwellings prepared by Stephen Hovansek, expressed the opinion that because of three factors, the unreasonably high cost of development, lack of sanitary sewer, and a low sell-out time based upon prior annual permits, it is not feasible in

the present zoning category. Stephen Hovansek, resident of an adjoining street, testified to the noise from aircraft and the costs in developing the site. One is the need for a temporary waste-water treatment facility at $660,000, culverting a portion of the ravine at $135,000, and improving the lots at $16,000 each, for a total of $2,465,000. He had no opinion on the financial feasibility of the single-home project. Lee Courtney, City Engineer for Richmond Heights, stated that $264,000 would be the cost for the waste-water plan and $11,700 for each lot if the treatment plant was constructed for the entire subdivision of 220 lots. The lower costs are based upon a smaller, temporary plant. The $11,700 estimate did not include culverting, nor did it take proper note of the current $8.00 per gallon cost approved by EPA. Also, the estimate did not include a 15% charge for engineering. Thus, Courtney's opinion is not fully supported.

Wayne Gerl testified that his total development costs for the 204 lots would be $5,919,990 and with sales of 26 lots per year and a 7-8 year sellout, he would sustain an indicated loss of $1,600,900.

James H. DeVall testified that recent home sales range up to $139,000 and properties have increased in value, even those in the flight path of the airport. However, twenty of the twenty-one sales were those of used homes. Wesley E. Baker, a real estate appraiser, testified that the current market value of the parcel under construction is $600,000, an increase from $450,000 in two years. However, the expert's report deals with R-3 zoning. The present zoning is, in fact, R-1.

The final witness was Mr. Robert Parry, an officer of the Regional Planning Commission, who testified that the area should remain unchanged and gave the Court the following opinions: placing industrial zoning is an intrusion into an established

residential area; industrial zoning is not needed, there being other undeveloped areas in Richmond Heights; increased traffic; asphalt parking would replace wooded areas. The Planning Commission has recommended (since 1964) that the airport be developed for light industrial and office businesses. The 1972 update projected a population of 20,000 by 1985 against an actual 11,000 in 1984. Between 1972 and 1979, a total of 251 permits were issued as against Parry's claim of 459 units. The opinion is also most optimistic when he claims the plaintiff could sell out the project in four and a half years. Only four pemits were issued in 1982. Also, his recommendation that 488 condominium units be constructed with an R-3 zoning is an admission tha the zoning needs to be changed.

The zoning law in Ohio is well established. A party challenging the zoning ordinances' constitutionality bears the burden of proving beyond fair debate that the ordinance is arbitrary and confiscatory. Euclid v.

Ambler Realty Co. (1926), 272 U.S. 365; Mobil Oil Corp. v. Rocky River (1974), 38 Ohio St. 2d 23; Central Motors Corp. v. Pepper Pike (1979), 63 Ohio App. 2d 34. To meet that burden, the party must prove that the alleged arbitrary and confiscatory ordinance is unreasonable in that it does not further a goal that relates to public health, safety, morals or general welfare goals of the community.

The standard was explained in Central Motors Corp. v. Pepper Pike, supra, at 51:

> The validity of a zoning ordinance is fairly debatable if reasonable minds may differ. A mere difference of opinion is not sufficient to make the issue of validity of a zoning ordinance fairly debatable because it is relatively easy for a property owner and a municipality to obtain the services of expert witnesses who will have differing opinions as to the validity of a zoning ordinance. The fairly debatable rule must concern itself not with mere words or expressions of opinion, but basic physical facts pertinent to the issue of the validity of the zoning ordinance.

Thus, if the questioned ordinance is fairly debatable about the purpose of the ordinance, then the legislative judgment must control. However, if it is not fairly debatable that

the ordinance is valid, then it must be declared unconstitutional. The Court must carefully weigh the facts to determine whether the basis of the opinions and conclusions brought out at trial are sound.

The case law in Ohio has long held that proof of economic loss alone will not result in a finding that a zoning ordinance is an unconstitutional taking of property. Curtiss v. City of Cleveland (1959), 1970 Ohio St. 127.

Nevertheless, proof of economic loss may be considered in determining whether there is a substantial relationship to public health, safety and welfare. In such case, evidence as to the diminution of value of the property must be balanced against the benefit to the public health, safety and welfare derived from existing zoning. Central Motors Corp. v. Pepper Pike, supra at 68. C. Miller Chevrolet, Inc. v. City of Willoughby Hills (1974), 38 Ohio St. 2d 238. As the Court found from the written reports, testimony and

opinions of several creditable experts, development of this landlocked area of 122 acres into single-family homes is simply not economically feasible. Losses in excess of one million dollars might reasonably be expected. And the City's experts have not successfully countered this evidence. Several have suggested agreement with the plaintiff if he chose to build condominiums or cluster housing.

What is the change in character of the area since the original zoning in 1929, the master plan of 1964, and the updating in 1972? The Cuyahoga County Airport is now an expanded facility with many new buildings housing corporate aircraft and thousands of flights a year, and new industrial development on both sides of the airport. While the city grew in population up to 1979 against a loss throughout the county, since 1980 there has been a reasonable number of sales of used homes, but virtually none in new housing starts. Therefore, the absorption rate in

the plaintiff's acreage directly affects its ability to market its homes under a R-1 zoning.

While the court notes the data on sales and lot availability back several years, some consideration can be given to the expectations for this property if present zoning is retained. It can reasonably be forecast that population in the city will not increase because of the relatively few parcels left and the aging of current population. In addition, the city's engineer predicted a sewage treatment plant is hopefully to be started in 1989-90 with completion about 1993. The developer is then required to construct a temporary sewage plant as a necessary adjunct, in turn delaying a final development. The realty taxes and possible income tax generated by an alternate development plan would enure to the benefit of the city as against a slow construction of single homes (due to the low absorption rate).

The Court is aware of the concerns of

citizens who own homes in the bordering streets. Some of these streets now end at the Euclid Creek ravine and the ravines surrounding the plaintiff's land. Dense woodland is part of the scenery and it provides both beauty and seclusion for the residents. But at trial, there was no evidence that the screening between the present streets and the property would be lost and homeowners would be forced to look at unattractive buildings. As stated in Euclid v. Ambler Realty Co.:

> Thus, the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined not by an abstract consideration of the building or of the thing considered a part, but by considering it in connection with the circumstances and the locality.

The three-pronged test, which the party challenging a zoning ordinance must meet, that is, the zoning classification must be beyond fair debate: (1) unconstitutional, (2) unreasonable and (3) not substantially

related to public health, safety, morals or general welfare, has been met. The courts have repeatedly ruled that zoning is, in the first instance, committed to the judgment and discretion of the legislative body. However, cases where one party unambiguously demonstrates, with a massive amount of evidence, the invalidity of a zoning classification mandate meaningful judicial review. This is one of those cases.

In this case, the Court finds that it is beyond fair debate that the property is improperly zoned and is unconstitutional.

Thus, under the application of Union Oil Co. v. Worthington (1980), 62 Ohio St. 2d 263, the Court gives notice to the zoning authority that, within a reasonable time certain, it may, at its option, rezone the property. Further notice is given that if the property is not rezoned within such period of time, the Court will authorize the property owner to proceed with a proposed use, based upon what evidence has previously

been submitted, or upon the hearing of further evidence.

NORMAN E. FUERST, Judge

Date: September 18th, 1984

SERVICE

A copy of the foregoing Opinion was sent by ordinanry U.S. mail this ____ day of September, 1984 to: Joseph Bartunek, Esq., attorney for plaintiff, 950 Bond Court Building, Cleveland, Ohio 44114; Charles E. Merchant, Esq. and K. J. Montgomery, Esq., attorneys for defendants, One Erieview Plaza, Suite 1101, Cleveland, Ohio 44114.

NORMAN E. FUERST, Judge

STATE OF OHIO)
) SS:
CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS

G & M RICHMOND)
)
Plaintiff,)
) JUDGMENT ENTRY
vs.)
)
CITY OF RICHMOND HEIGHTS)
)
Defendant)

In accordance with the Memorandum of Opinion filed herein, the Court enters a decree in favor of the plaintiff on its complaint for a declaratory judgment and gives notice to the defendant and its zoning authority, that it shall, within a reasonable time certain, rezone the property. At defendants costs.

JUDGE NORMAN A. FUERST

Dated: 9/20 1984

APPENDIX D

IN THE SUPREME COURT
STATE OF OHIO

G & M RICHMOND	)	CASE NUMBER 86-489
	)	
Plaintiff/Appellant	)	
	)	
vs.	)	
	)	
CITY OF RICHMOND HEIGHTS	)	
	)	
	)	
Defendant/Appellee	)	
	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES
BY G & M RICHMOND, PLAINTIFF/APPELLANT

Notice is hereby given that G & M Richmond, a partnership, the Plaintiff Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of Ohio, Eighth Appellate District, which decision reversed the finding of the trial court, that the City of Richmond Heights was acting in an unlawful manner as set forth in paragraph 1 hereinbelow. Said order and

decision was submitted to the Supreme Court of Ohio on a Motion to Certify, which motion was overruled on May 28, 1986, by said Supreme Court of the State of Ohio.

This appeal is taken pursuant to 28 USC §1257 (2).

The Clerk will please prepare a transcript of record in this cause, for the transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: The complete record.

The following question is presented by this appeal:

1.) Does Chapter 1135 of the Ordinances of the City of Richmond Heights, Ohio, restricting the use of Plaintiff Appellants' land to R-1 Single Family Residential use, deprive Plaintiff/Appellant of the lawful use of its property, without due process and contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States, and contrary to §§ 1, 16 and 19 of Article II of the Constitution of the State of Ohio?

WILLIAM F. SNYDER

JEROME S. BERKELEY
MARSHMAN, SNYDER and CORRIGAN
Counsel for
Plaintiff/Appellant

PROOF OF SERVICE

I, JEROME S. BERKELEY, one of the attorneys for G & M RICHMOND, Plaintiff Appellant, herein, depose and say, that I served a copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, on Charles E. Merchant, and K. J. Montgomery, attorneys for the CITY OF RICHMOND, and on Anthony J. Celebreeze, Jr., Attorney General of the State of Ohio, 30 East Broad Street, Columbus, Ohio 43215 by depositing the same in the United States mail, postage prepaid, this 12th day of August, 1986.

Affiant further states that all parties who are required to be served have been served as set forth above.

DATED this 12th day of August, 1986.

JEROME S. BERKELEY

STATE OF OHIO)
) SS
COUNTY OF CUYAHOGA)

Subscribed and sworn to before me, by JEROME S. BERKELEY this 12th day of August, 1986.

Witness my hand and official seal.

PATRICIA A. LEHKY
Notary Public

State of Ohio
My Commission Expires December 17, 1990

Supreme Court, U.S.
FILED
SEP 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-265

In the Supreme Court of the United States

October Term, 1986

G & M RICHMOND,
Appellant,

vs.

CITY OF RICHMOND HEIGHTS,
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTION PRESENTED

Whether potential economic deprivation by means of pre-existing zoning restrictions applicable to recently acquired property and increased usage of a county airport located across a highway which separates zoning districts is sufficient evidence to declare improper and unconstitutional a comprehensive zoning ordinance which has been adopted and reviewed periodically by professional city planners.

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No. 86-265

In the Supreme Court of the United States

October Term, 1986

G & M RICHMOND,
Appellant,

vs.

CITY OF RICHMOND HEIGHTS,
Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS OR AFFIRM

Appellee respectfully moves this Court to dismiss the within appeal on the basis that there is no substantial federal question presented or, in the alternative, to affirm the action of the Ohio Supreme Court in refusing to review the judgment of the Eighth Judicial District Court of Appeals of Ohio as a proper statement of the law with respect to the questions presented, on the basis of the brief submitted with respect to each motion.

STATEMENT OF FACTS

A. Facts About Property

The subject property consists of a 122-acre estate of wooded land located in the City of Richmond Heights, Ohio, which was the residence of the Mavec family from 1955 (Jt. Ex. 20, page 5) until sold to appellant in 1982

(T. 211). The property is zoned for single-family residential development, a fact of which the appellant was aware when it purchased the land (T. 211) in 1982 through a scheme of financing indicating a fair market value of $450,000 (Ex. E) for the stated primary purpose to make money from the land by having it rezoned for office-industrial use (T. 204).

The subject property is not vacant and raw land but rather there exists on the property either four or five homes, one of which has fire damage. The others are rented (T. 467). There is a pond, tennis courts, a stable, garage complex and related residential improvements and landscaping located on the property (T. 467).

The land was zoned single-family residential in 1929 and is a portion of land formerly known as the Swetland Estate comprising 157 acres. The property was acquired by the Mavec family in 1955 who used 35 acres of this land for the development of Lancaster Estates Subdivision, the present site of 117 homes (T. 467). Lancaster Estates Subdivision contains a stub street so that subsequent residential development on appellant's property could be constructed adjoining the existing subdivision (T. 597, 411). The Lancaster Estates Subdivision appears on Exhibit A, located in the Appendix of this Motion, and is marked with an "A". The Exhibit depicts existing subdivisions surrounding the subject property upon which homes have been constructed.

Adjacent to the subject property to the south is the Fairlawn Subdivision developed in 1955 upon which are located 33 homes. Fairlawn Subdivision also contains stub streets designed to continue residential building onto the adjoining subject property in good planning fashion (T. 597). This subdivision appears on Exhibit A and is marked with a "B".

Both the Lancaster Estates and Fairlawn Subdivisions are on the same level of terrain and neither are separated from the subject property by ravines.

Even though the land is in an area of Richmond Heights containing natural ravines, upon one ravine which follows the rear, southwest, property line are 193 homes which were built during the 1960s as a part of the Scottish Highlands Subdivision which is marked on Exhibit A with a "C" and forms a large portion of residential homes within the City of Richmond Heights. The deepest ravine on plaintiff's property is the same ravine upon which homes in the Scottish Highlands' Royal Oak Boulevard area front, some of which were sold in 1983 for between $110,000 and $115,000 (T. 49, 160).

Due to one ravine running roughly through the center of the property, a culvert and a road must be built to connect the front flat usable area and rear flat usable area of the land if developed for *any* purpose (T. 144). Sewage treatment will also be required *regardless* of the type of development proposed (T. 144). Due solely to the natural topography of the land, the subject property contains only 88 buildable acres *regardless* of use (T. 159).

The only portion of the subject property not abutted by single-family residential development is the frontage of 1,148 feet which abuts Richmond Road and contains the bulk of the buildable land. Richmond Road has been since 1929 and continues to be *a two-lane highway* (T. 157).

Richmond Road forms the natural divider between the frontage of the subject property and the Cuyahoga County Airport (T. 599) and serves as a divider of zoning districts (T. 599). To screen the Cuyahoga County Airport from the view of the homes already located in the vicinity of the subject property, the County installed a landscaping

buffer along Richmond Road consisting of some beautiful scenery and mounds with trees and shrubbery (T. 304, 341). The buffering zone is approximately 200 feet in depth off of Richmond Road for almost the entire length of the Cuyahoga County Airport property and includes mounding, conifer trees, deciduous trees, shrubbery and landscaping all along the eastern side of Richmond Road (T. 575).

The Director of Aviation of the Cuyahoga County Airport testified that the flight path of the airport does not extend across the subject property (T. 301).

The Fairlawn Subdivision homes were constructed into the early 1960s when airport flights were 34,000 per year and the Scottish Highlands Subdivision enjoyed quick home sales during the 1970s even though the airport was then at its peak and conducting over 100,000 flights annually (Ex. 15).

The number of annual flights coming and going from the airport have decreased since 1973 (Ex. 15) due, in part, to the deletion of plans to establish a second runway at the Cuyahoga County Airport (T. 593). Furthermore, flight operations for jet aircraft have been restricted to daytime hours in recent years (T. 303).

The subject property received its original single-family residential zoning classification in 1929 when Richmond Heights adopted a comprehensive zoning ordinance. The zoning ordinance of 1929 was subject to review and a comprehensive master plan was prepared by Barton & Gould, city planners in 1964 (Ex. A). The 1964 Master Plan was reviewed, revised and updated in 1972 by the Regional Planning Commission of Cuyahoga County (Ex. RR). A request by the former owner of the property

(Mavec) for industrial and office use was studied by Regional Planning and rejected by Council in 1980 (Ex. QQ).

B. Facts About the Trial

Thirteen witnesses, some of whom were experts, testified at the trial of this matter. Two engineers gave differing views. Appellant employed Roger Ritley, a property-economist, and appraiser Richard Van Curen who performed a feasibility analysis. Appellant property owner, Wayne Gerl, testified that he was aware of the residential zoning of the subject property before purchasing same in 1982 (T. 211) for $450,000 (T. 205). He speculated about dramatic out-of-pocket losses he would incur to develop his property residentially. His figures *differed from his employed experts* and were obtained when he "just checked with real estate experts in the area" (T. 188).

The City's witnesses included expert appraiser Wesley Baker who calculated the fair market value of the subject property as residentially zoned at $600,000, an increase in fair market value of $150,000 in the three years which had passed since appellant had purchased the land (T. 466). He calculated fair market value in accordance with the dicta of *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34 and testified that the owners would not incur any actual out-of-pocket loss in developing this land under the present residential zoning classification.

City planner, Robert Parry, had been involved with zoning updates of the City in previous years and continued to recommend that the zoning for the subject property was properly residential:

"I concluded that the current zoning was reasonable and that it is an appropriate zoning for the site. And as was found in the two previous plans. [-] both recommended that this land stay residential. I concurred that it should stay residential and that the intrusion of industrial, nonresidential development on this site was really inappropriate for the site." (T. 603)

Upon review of the transcript and evidence, the Eighth District Court of Appeals held, in view of the above and other trial testimony, that the validity of the challenged single-family residential zoning ordinance was fairly debatable and, therefore, the judgment of the trial court was against the weight of the evidence in that the trial court had usurped the legislation function by substituting its judgment for that of the Richmond Heights city council (Court of Appeals Journal Entry and Opinion, Jurisdictional Statement, p. 45).

THIS APPEAL SHOULD BE DISMISSED AS THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

This case began as a trial to the court upon a complaint for declaratory judgment alleging that the single-family residential zoning for appellant's property was arbitrary, discriminatory, unreasonable and unconstitutional as applied to its property. To this zoning ordinance was attached a presumption of validity. *Brown v. Cleveland* (1981), 66 Ohio St. 2d 93; *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23. In attacking the validity of the zoning ordinance, appellant had the burden of proving the ordinance unconstitutional by taking the matter beyond the reach of fair debate. *Benjamin v. Columbus* (1957),

167 Ohio St. 103; *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App. 2d 34; *Alsenas v. Brecksville* (1972), 29 Ohio App. 2d 255.

The "beyond fair debate" test was explained in *Central Motors Corp. v. Pepper Pike, supra,* in the following manner:

> "The validity of a zoning ordinance is fairly debatable if reasonable minds may differ. A mere difference of opinion is not sufficient to make the issue of validity of a zoning ordinance fairly debatable because it is relatively easy for a property owner and a municipality to obtain the services of expert witnesses who will have differing opinions as to the validity of a zoning ordinance. *The fairly debatable rule must concern itself not with mere words or expressions of opinion, but basic physical facts pertinent to the issue of the validity of the zoning ordinance.* (Emphasis added.)
>
> Where it appears from *all the facts* that room exists for a difference of opinion concerning the reasonableness of a zoning classification, the legislative judgment is conclusive. Within reasonably debatable areas of judgment and policies, courts will not attempt to decide what ought to be done or not done by local zoning authorities. Only where illegality is clearly demonstrated or where the ordinance is arbitrary, unreasonable or discriminatory is judicial interference warranted." (Emphasis in original.)

Despite the clearly established guidelines of the Ohio Supreme Court and numerous appellate court decisions concerning the trial of zoning cases, the trial court in this case took solely an economic approach to this matter and held the residential zoning ordinance unconstitutional. The

appellee, City of Richmond Heights, appealed the trial court's decision as against the weight of the evidence, as having improperly shifted the burden of proof to the City and as having substituted its judgment for the judgment of the Richmond Heights City Council on matters which were clearly debatable.

The Court of Appeals was thereafter charged with the duty of reviewing the evidence, i.e. *all the facts* presented at trial. Its review function was analogous to the function of the reviewing appellate court in the *Central Motors* zoning case wherein the court noted in the third syllabus that:

> "3. * * * The issues to be determined in a declaratory judgment action attacking constitutionality of a zoning ordinance may include an objective determination as to whether the ordinance is unreasonable, arbitrary and confiscatory and not based on the public health, safety, morals and general welfare, and thus whether or not it is unconstitutional. * * *" *Id.*

The question on appeal in this case *was not* whether the appellate court could find some evidence to support the trial court's conclusion but whether the plaintiff had overcome the presumption of validity and placed beyond fair debate the reasonableness of the actions of council in zoning the property for residential use *and* that the ordinance had no substantial relationship to the public health, safety and general welfare for all the citizens of the city as opposed to the individual property owner. This appellate task required a review of the evidence.

For generations it has been a firmly established rule in Ohio appellate review law that the Court of Appeals not only has the power to weigh evidence but, if the case is

a proper one and the question has been properly brought up on the record, it is its duty to do so. *Finley v. Whitley,* 46 Ohio St. 524; *Bahl v. Byal,* 90 Ohio St. 129; *Werner v. Rowley,* 129 Ohio St. 15, 1 Ohio Op. 309, 193 N.E. 623. "Upon questions of this character it is practically the court of last resort. At least it is the last court which the parties have a legal right to require to pass upon the weight of the evidence." 5 O. JUR. 3d, *Appellate Review,* Section 595.

The court of appeals found that qualitative evidence had been introduced at trial by the City supporting the reasonableness and constitutionality of the residential zoning and, therefore, that the appellant had failed to place the validity of the zoning legislation beyond fair debate. The Supreme Court of Ohio has held in the second syllabus of *State, ex rel. Jack v. Russell* (1954), 162 Ohio St. 281, 123 N.E.2d 261, that:

> "2. It is not within the judicial function for courts to pass upon the wisdom of a zoning ordinance; they may only determine whether such an ordinance is reasonably comprehensive in its application and has a reasonable relation to the preservation of the public health, safety and morals; and, where such an ordinance is so qualified, its enforcement does not constitute a taking of private property without compensation or the taking of property without due process of law, within the meaning of constitutional requirements."

The court of appeals herein found that reasonable minds could differ as to the appropriateness of the residential zoning classification as applied to appellant's property. Some of the facts properly found by the court of appeals included the following:

1. Appellee presented no evidence which demonstrated the ordinance was arbitrary, confiscatory and not related to the public health, safety, morals and general welfare.

2. The commercial development occurring in Richmond Heights is taking place in areas of the community removed from these residential areas. In addition, undeveloped land zoned for industrial use exists in other areas of Richmond Heights.

3. The fact appellee could reap substantially larger profits by developing the property for industrial purposes does not justify destroying the picturesque topography of the area. Despite the growth of the nearby Cuyahoga County Airport, the areas immediately surrounding the subject property remain residential neighborhoods. The homeowners in these surrounding areas invested in their homes with the expectation the natural beauty of the area would not be invaded by the establishment of an industrial complex in their backyards.

4. At trial the *only* factor appellee proved was the economic loss it would incur as a result of the existing zoning ordinance. Economic loss alone is not a sufficient reason to declare a zoning provision unconstitutional.

5. The trial was in essence a battle of experts. Appellant's experts testified the present R-1 zoning designation is reasonable and appropriate while appellee's experts countered with testimony the single-family residential classification is not feasible. Thus, the evidence presented at trial established reasonable minds differ on the issue of the reasonableness of the zoning ordinance.

Although the appellant presented a voluminous amount of evidence, the court of appeals was also correct in finding the balancing between the public benefit and the individual loss was of a *qualitative* nature and not of a quantitative nature. See: *Alsenas v. Brecksville* (1972), 29 Ohio App. 2d 255.

From its review of all of the underlying physical facts in this case, the court of appeals properly concluded that the evidence presented by the appellee had not removed the zoning legislation beyond the realm of fair debate, the standard test in Ohio to this date. The lower court decision was, therefore, against the manifest weight of the evidence and the court of appeals properly reversed.

The Ohio Supreme Court refused to take jurisdiction of this matter for the sole purpose of re-reviewing the evidence presented at the trial of this case. Appellant claims the decision of the court of appeals was, in effect, against the manifest weight of the evidence.

Ohio Revised Code Section 2505.31 states:

> "In a civil case or proceeding, except when its jurisdiction is original and except as provided by Section 2309.59 of the Revised Code, the Supreme Court need not determine as to the weight of the evidence."

In accordance with this statutory provision, it is and has been for many decades the established practice of the Supreme Court of Ohio to refuse to weigh the evidence to determine its sufficiency, where the preponderance lies, or whether correct conclusions as to the facts were reached by the courts below. *Pomeroy v. Webber* (1965), 2 Ohio St. 84, 206 N.E.2d 204.

The test applied by the state court of appeals in this case was the "beyond fair debate" standard discussed previ-

ously. Even appellant indicates in its Jurisdictional Statement that the "beyond fair debate" standard was the appropriate test to apply.

No question of law is suggested. The court of appeals found from its review of the factual record that there existed a reasonable and rational basis for the continuing applicability of the challenged residential zoning restriction to the particular property. This case is, therefore, distinguished from the Ohio Supreme Court's decision in *Mayfield-Dorsh, Inc. v. South Euclid* (1981), 68 Ohio St. 2d 156, discussed in appellant's brief.

Faced with an unfavorable court decision, appellant has now requested that this Supreme Court of the United States review the evidence presented at trial for a third time. Appellant has gratuitously highlighted favorable evidence contained in the Journal Entry of the trial court for this Court's review should it decide to fly in the face of "decades of established practice" "to weigh the evidence to determine its sufficiency . . . or whether correct conclusions as to the facts were reached by the court of appeals below." *See*, 5 O. JUR. 3d, *Appellate Review*, Section 593. The City of Richmond Heights urges this Court not to become involved in the weighing of conflicting evidence again.

THE JUDGMENT OF THE OHIO STATE SUPREME COURT SHOULD BE AFFIRMED.

This lawsuit stems from one entity's attempts to maximize profits by developing one recently acquired property without regard to well-planned zoning restrictions. Appellant purchased the subject property in 1982 for essentially $450,000 (Ex. E) knowing the land was zoned for

single-family residential use (T. 211). The property as currently zoned has a fair market value of $600,000 (T. 466). This experienced contractor made the purchase "under the assumption that the property would be rezoned for office-industrial" use (T. 211). The prime motivating factor in appellant's purchase was to make money from the property by having it rezoned. Facing lesser profits if the land is developed residentially, appellant contends that this case contains a substantial federal question. Rather, the ramifications of this case are clearly confined to the extent of future profits to be earned by appellant from the development of its recently acquired realty.

The application of law to the facts by trial courts and the duties of appellate courts to review the record and weigh the evidence applicable to zoning cases have been established in numerous case precedents from this Supreme Court as well as lower appellate courts throughout the country.

Because the private interests of appellant do not rise to the level of public or great general interest that this court should address and the appellant has failed to present a substantial constitutional question, the within case is not appropriate for review by this Court and jurisdiction should be denied and the decision of the lower court should be affirmed.

Respectfully submitted,

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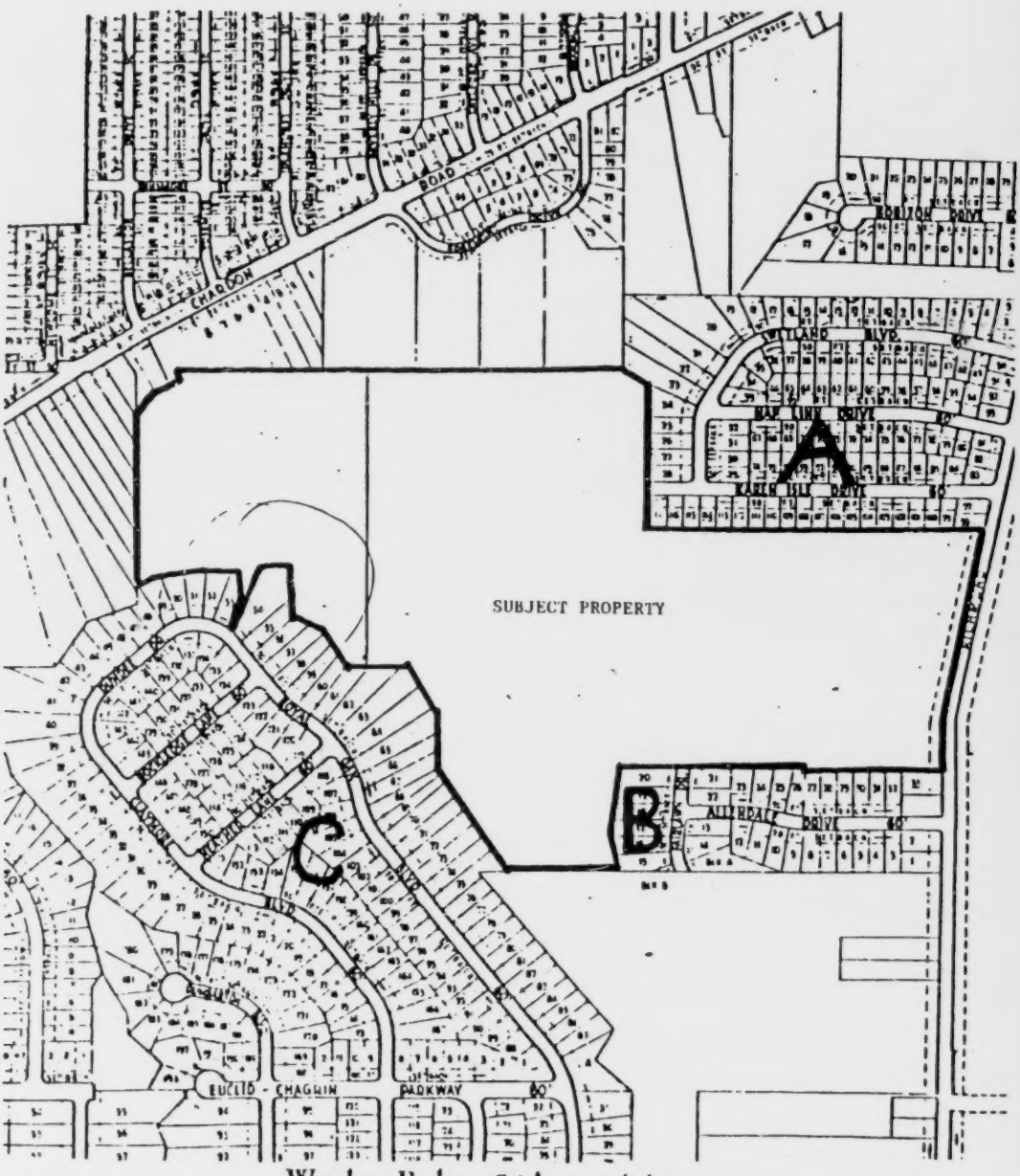
APPENDIX

DEFENDANT'S EXHIBIT H - Page 2

EXHIBIT "A"



Wesley Baker & Associates